

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW DERRICK ROWLEY,

Defendant and Appellant.

E068954

(Super.Ct.No. RIF1205156)

OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge.

Reversed with directions.

Rex Adam Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Charles C. Ragland and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Matthew Derrick Rowley, filed a petition for redesignation of his felony conviction pursuant to Health and Safety Code section 11361.8, which the court denied. On appeal, defendant contends the court erred in denying his petition for redesignation. The People concede the matter must be reversed. We reverse and remand with directions.

### I. FACTUAL AND PROCEDURAL HISTORY<sup>1</sup>

On December 31, 2012, in case No. RIF1205156, the People charged defendant by felony complaint with possession of marijuana for sale (Health & Saf. Code, § 11359; count 1), unlawful possession of a firearm having previously suffered a conviction for possession of a controlled substance for sale (Pen. Code, §§ 29800, subd. (a)(1), 23515; count 2), and unlawful possession of ammunition by a prohibited person (Pen. Code, § 30305, subd. (a); count 3), all the offenses which were alleged to have occurred on November 3, 2012. On January 23, 2013, in case No. RIF1300594, the People charged defendant by felony complaint with two counts of robbery (Pen. Code, § 211; counts 1 & 2), first degree burglary (Pen. Code, § 459; count 3), and kidnapping (Pen. Code, § 207, subd. (a); count 4), all the offenses which were alleged to have occurred on January 17, 2013. The People additionally alleged defendant personally used a firearm in his

---

<sup>1</sup> We take judicial notice of the record in defendant's appeal of his conviction in superior court case Nos. RIF1300594 and RIF1300626, our case No. E063254. (Evid. Code, § 459.)

commission of all the offenses. (Pen. Code, §§ 12022.53, subd. (b), 1192.7, subd. (c)(8).)<sup>2</sup>

On March 15, 2013, the People filed an amended felony complaint in case No. RIF1300594 charging defendant with the additional offenses of kidnapping (§ 207, subd. (a); count 5), two counts of false imprisonment (§ 236; counts 6 & 7), and kidnapping for ransom (§ 209, subd. (a); count 10), all the offenses which were also alleged to have occurred on January 17, 2013. As to counts 5, 6, and 7, the People additionally alleged defendant personally used a firearm. (§§ 12022.53, subd. (b), 1192.7, subd. (c)(8).)

On November 13, 2014, the People charged defendant by first amended information in case No. RIF1300594 with murder (§ 187, subd. (a); count 1), misdemeanor assault (§ 240; count 2), robbery (§ 211; count 3), kidnapping (§ 207, subd. (a); count 4), first degree burglary (§ 459; count 5), and two counts of false imprisonment (§ 236; counts 6 & 7). The People additionally alleged defendant personally used a firearm in his commission of the counts 1, 3, 4, 5, 6, and 7 offenses. (§§ 12022.53, subd. (b), 1192.7, subd. (c)(8).)

On January 30, 2015, a jury convicted defendant of first degree murder (§ 187, subd. (a); count 1), simple assault (§ 240; count 2), robbery (§ 211; count 3), kidnapping (§ 207, subd. (a); count 4), first degree burglary (§ 459; count 5), and two counts of false imprisonment (§ 236; counts 6 & 7). The jury additionally found true the allegations defendant had personally used a firearm in his commission of the counts 1, 3, 4, 5, and 6,

---

<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

offenses. (§§ 12022.53, subd. (b), 1192.7, subd. (c)(8).) On April 3, 2015, the court sentenced defendant to a determinate term of 28 years of imprisonment plus 50 years to life.

On the same day thereafter, pursuant to a plea deal in case No. RIF1205156, defendant pled guilty to possession of marijuana for sale (Health & Saf. Code, § 11359; count 1) and unlawful possession of ammunition by a prohibited person (Pen. Code, § 30305, subd. (a); count 3).<sup>3</sup> In return, the court dismissed the count 2 charge and sentenced defendant to the low term of 16 months on each of the offenses to be served both concurrently to one another and concurrently to defendant's sentence in case No. RIF1300594.

On February 3, 2017, in case No. RIF1205156, defendant filed a petition for redesignation of his count 1 conviction for felony possession of marijuana for sale to a misdemeanor pursuant to Health and Safety Code section 11361.8, subdivision (b). On May 3, 2017, the People filed a response contending defendant was ineligible for redesignation of the offense because defendant had a prior so-called "super strike," his

---

<sup>3</sup> In a third case, defendant additionally entered a plea of guilty to robbery (Pen. Code, § 211; count 2) which he admitted he committed while on release from custody in case No. RIF1300594. In a fourth case, defendant pled guilty to assault with a deadly weapon after the People moved to reduce the offense from a felony to a misdemeanor. In a fifth case, defendant pled guilty to violating a protective order. (Fam. Code, § 6218.) In a sixth case, defendant admitted violating his probation.

conviction for murder in case No. RIF1300594. On May 8, 2017,<sup>4</sup> the court denied defendant's petition noting: "Def has 187 PC prior – not eligible."

## II. DISCUSSION

Defendant contends that since the People failed to produce any evidence defendant did not qualify for redesignation of his conviction for possession of marijuana for sale, insufficient evidence supports the court's denial of his petition. Defendant notes: "[T]he People failed to show [defendant] had been convicted of the murder in RIF1300594 when he possessed the marijuana for sale on November 3, 2012."

The People concede the matter should be reversed with directions to the trial court to enter an order granting defendant's petition, "[b]ecause he did not have the murder conviction at the time he committed the possession of marijuana for sale offense, he is eligible for relief under [Health and Safety Code] section 11361.8." The People note defendant's argument on appeal is correct because "his murder conviction occurred after he committed the drug offense . . . ." "The defendant did not have a 'super strike' conviction at the time he committed the marijuana for sale offense." "[A]t the time he was charged with the marijuana for sale offense under [Health and Safety Code] section 11359, he did not yet have a 'super strike,' the murder conviction." We agree.

"In 2016, the voters passed Proposition 64, legalizing recreational marijuana use. Pertinent to the issue herein, Proposition 64 amended [Health and Safety Code] section

---

<sup>4</sup> The written order is dated May 8, 2017; the minute order reflecting the denial is dated June 5, 2017.

11359, generally making it a misdemeanor offense. ‘Every person 18 years of age or over who possesses cannabis for sale shall be punished by imprisonment in a county jail for a period of not more than six months or by a fine of not more than five hundred dollars (\$500), or by both such fine and imprisonment.’ [Citation.] Even after the amendment, possession of marijuana for sale may still be charged as a felony if the defendant has a prior conviction for an offense that requires registration pursuant to Penal Code section 290, or has ‘one or more prior convictions for an offense’ listed in Penal Code section 667, subdivision (e)(2)(C)(iv). [Citation.]” (*People v. Smit* (2018) 24 Cal.App.5th 596, 600.)

“Proposition 64 also added [Health and Safety Code] section 11361.8, a vehicle by which a defendant currently serving a sentence for a conviction for any of a number of marijuana-related statutes, including [Health and Safety Code] section 11359, may petition the trial court for resentencing or dismissal of the drug conviction if the offense is no longer a crime or is now a lesser offense. ‘A person currently serving a sentence for a conviction, whether by trial or by open or negotiated plea, *who would not have been guilty of an offense, or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense* may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing or dismissal in accordance with [Health and Safety Code] Sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362.4 as those sections have been amended or added

by that act.’ ([Health & Saf. Code,] § 11361.8, subd. (a), italics added.) When a defendant files a petition pursuant to [Health and Safety Code] section 11361.8, subdivision (a), the trial court must presume the defendant qualifies for relief absent ‘clear and convincing evidence’ the defendant does not satisfy the criteria set forth in subdivision (a) of the same section. ([Health & Saf. Code,] § 11361.8, subd. (b).) If the defendant qualifies for resentencing, the trial court must grant the defendant relief unless it ‘determines that granting the petition would pose an unreasonable risk of danger to public safety.’ [Citation.]” (*People v. Smit, supra*, 24 Cal.App.5th at pp. 600-601.)

“A person who has completed his or her sentence for a conviction under [Health and Safety Code] Sections 11357, 11358, 11359, and 11360, whether by trial or open or negotiated plea, who would not have been guilty of an offense or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the conviction dismissed and sealed because the prior conviction is now legally invalid or redesignated as a misdemeanor or infraction in accordance with [Health and Safety Code] Sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362.4 as those sections have been amended or added by that act.” (Health & Saf. Code, § 11361.8, subd. (e).)

“The court shall presume the petitioner satisfies the criteria in subdivision (e) unless the party opposing the application proves by clear and convincing evidence that

the petitioner does not satisfy the criteria in subdivision (e). Once the applicant satisfies the criteria in subdivision (e), the court shall redesignate the conviction as a misdemeanor or infraction or dismiss and seal the conviction as legally invalid as now established under the Control, Regulate and Tax Adult Use of Marijuana Act.” (Health & Saf. Code, § 11361.8, subd. (f).)

A defendant is entitled to such relief so long as, at the time he “was charged with felony possession of marijuana for sale, he had not suffered any *prior* conviction of a so-called super strike.” (*People v. Smit, supra*, 24 Cal.App.5th at p. 602, italics added [the defendant charged with felony marijuana possession in the same case in which he was charged with four counts of attempted murder did not render the defendant ineligible for relief under Health & Saf. Code, § 11361.8].) “The statute requires a ‘prior conviction[.]’ [Citation.]” (*Ibid.*) Subsequent convictions for super strike offenses do not render a defendant ineligible for relief. (*Ibid.*)

Here, as stated by the People in its opposition to defendant’s petition and in the court’s order, defendant did have a conviction for murder, which qualifies as a super strike. However, defendant’s conviction for murder occurred on January 30, 2015. Yet, the People *charged* defendant for possession of marijuana for sale on December 31, 2012, more than two years *prior* to his conviction for murder. Thus, because defendant did not have a super strike conviction *prior* to being charged with possession of marijuana for sales, defendant is entitled to the relief he requested, redesignation of the



offense from a misdemeanor to a felony. Therefore, the court erred in denying his petition.

### III. DISPOSITION

The order denying the petition and finding defendant ineligible for redesignation is reversed. The matter is remanded with directions to the court to grant defendant's petition.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER  
Acting P. J.

We concur:

MILLER  
J.

RAPHAEL  
J.